BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

LAVITA BRANDON Claimant	)	
VS.	)	Docket No. 1,058,735
FARMERS INSURANCE GROUP Respondent	)	
AND	)	
LIBERTY MUTUAL INSURANCE CO. Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier appealed the February 8, 2012, preliminary hearing Order entered by Administrative Law Judge (ALJ) Steven J. Howard. R. Carl Mueller, Jr., of Kansas City, Missouri, appeared for claimant. Lara Q. Plaisance, of Kansas City, Kansas, appeared for respondent and its insurance carrier (respondent).

The record on appeal consists of the transcript of the February 7, 2012, preliminary hearing and Claimant's Exhibit 1 thereto; the transcript of the February 6, 2012, deposition of Dr. Brian J. Divelbiss and exhibits thereto; and all pleadings contained in the administrative file. When received by the Board, Claimant's Exhibit 1 to the preliminary hearing transcript contained only the medical report of Dr. James A. Stuckmeyer, medical records of Dr. Suzanne G. Elton and a document entitled "Musculoskeletal Disorders (MSDs)." Claimant's Exhibit 1 to the preliminary hearing transcript did not include the records of Drs. Michael E. Ryan and John E. Oxler, Jr., nor records from OHS. On March 23, 2012, the parties stipulated that Claimant's Exhibit 1 to the preliminary hearing

transcript would include the MSD document, Dr. Stuckmeyer's report, the records of Drs. Elton, Ryan and Oxler, and the OHS records.[1]

ISSUES

Claimant alleged that "[o]n or about September 8, 2008 through November 18, 2011",[2] she sustained the following injuries: "[b]ilateral carpal tunnel syndrome, left and right upper extremities, body as a whole."[3] Claimant asserted the cause of her injuries was answering 50 to 60 telephone calls a day and repetitively keyboarding information into the computer for each call. Claimant requested that the ALJ appoint Dr. Elton as claimant's authorized treating physician.

Respondent asserted that claimant's work activity of keyboarding was not the prevailing factor that caused claimant's carpal tunnel syndrome. Respondent then argued claimant's carpal tunnel syndrome did not arise out of and in the course of her employment. Respondent also objected to the ALJ's admission of Dr. Stuckmeyer's report and the MSD document.

The ALJ authorized Dr. Suzanne G. Elton to perform surgery on claimant, implying claimant met her burden of proving she sustained a personal injury by repetitive trauma arising out of and in the course of her employment with respondent. ALJ Howard also denied respondent's objections to Claimant's Exhibit 1 to the preliminary hearing transcript.

The issues before the Board on this appeal are:

1. Did the ALJ err by admitting the medical report of Dr. Stuckmeyer and the Musculoskeletal Disorders document as part of Claimant's Exhibit 1 to the preliminary hearing transcript?

2. Did claimant sustain carpal tunnel syndrome by repetitive trauma arising out of and in the course of her employment with respondent? Specifically, were claimant's work activities the cause of her injuries?

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[1] It appears the ALJ considered only the medical report of Dr. Stuckmeyer, the MSD document and the medical records of Dr. Elton as Claimant's Exhibit 1 to the preliminary hearing transcript. The Board will consider all of the reports, records and documents that the parties stipulated were part of Claimant's Exhibit 1 to the preliminary hearing transcript. The Board is cognizant of the fact that at the preliminary hearing respondent objected to the medical report of Dr. Stuckmeyer and the MSD document.

[2] Application for Hearing (filed Dec. 7, 2011).

[3] *Id.*

FINDINGS OF FACT

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member finds:

At the preliminary hearing, claimant testified she was 49 years of age and had worked for respondent for three years. Claimant was a Senior Service Advocate, which required her to receive incoming calls, perform constant keyboarding, frequently use a computer mouse and sometimes call agents. She estimated receiving 50 to 60 calls a day and would sometimes have five or six screens up on her computer monitor at one time. In 2010, respondent installed a new system that required claimant to answer more calls and do more cutting and pasting on the computer.

In 2011, claimant began experiencing wrist pain and sought treatment on November 9, 2011, from her family physician, Dr. John E. Oxler, Jr. Claimant testified, and Dr. Oxler's records indicated, the onset of wrist pain was gradual. Dr. Oxler ordered nerve conduction/EMG studies (EMG) on both wrists, which were conducted by Dr. Michael E. Ryan on November 18, 2011. Dr. Ryan's conclusions were that the EMG revealed moderate right median entrapment neuropathy at the level of the wrist and mild to moderate left median entrapment neuropathy at the level of the wrist. He also indicated that claimant's symptoms suggested tendinitis, but palpation at the base of her thumb up along the radial aspect where de Quervain's would occur did not elicit pain or discomfort and there was no swelling in that area or calor.

Claimant was sent to OHS-Compcare, where she saw Dr. William H. Tiemann on November 30, 2011. Claimant reported to Dr. Tiemann that a couple of months earlier she started having sharp pains to both of her wrists. Claimant brought Dr. Tiemann the EMG studies and Dr. Ryan's interpretation of those studies. Dr. Tiemann diagnosed claimant with bilateral carpal tunnel syndrome. He had claimant fitted for wrist braces, told claimant to take Tylenol/Ibuprofen, and to ice the affected areas. Dr. Tiemann allowed claimant to return to full work duty. He also requested approval from respondent to refer claimant to a hand specialist.

On December 9, 2011, claimant saw Dr. Suzanne G. Elton, an orthopedic surgeon. Claimant reported numbness and tingling in all her fingers, including her thumbs, with the right wrist worse than the left. Dr. Elton's records indicate claimant's injuries occurred on November 30, 2011, when claimant began to experience sharp pains at work. Dr. Elton reviewed the records of Dr. Ryan and the EMG studies he conducted. She assessed claimant with bilateral carpal tunnel syndrome and discussed several treatment options with claimant, including splints, injections and surgery. Dr. Elton was the first physician who gave claimant work restrictions. She gave claimant temporary restrictions of left-handed work only, decreasing her priority for receiving telephone calls and using splints at night only. Ultimately, Dr. Elton recommended surgery, consisting of endoscopic carpal

tunnel release. However, claimant reported for surgery on the day it was scheduled, only to learn it was cancelled by respondent.

At the request of her attorney, claimant was seen on January 19, 2012, by Dr. James A. Stuckmeyer, an orthopedic surgeon. He reviewed the medical records of Drs. Elton, Oxler and Ryan. Dr. Stuckmeyer also obtained detailed information concerning claimant's job duties. Claimant reported that she was still working at restricted duty and had increased symptoms of bilateral tingling and numbness, bilateral wrist pain with nocturnal awakening, decreased grip strength and difficulty with fine motor skills. His conclusion was:

> I feel within reasonable medical certainty that as a direct, proximate, and prevailing factor of repetitive keyboarding performed by Ms. Brandon while employed with Farmers Insurance that she has developed symptoms of bilateral carpal tunnel syndrome, right greater than left. I would concur with Dr. Elton that bilateral carpal tunnel releases are warranted, and feel within in *[sic]* a reasonable degree of medical certainty that the necessity for the surgical procedure is a direct, proximate, and prevailing factor of the repetitive keyboarding performed while employed at Farmers Insurance.[4]

In his report, Dr. Stuckmeyer explained how he believes repetitive work activities can cause carpal tunnel syndrome:

> Tendon inflammation resulting from repetitive work, such as uninterrupted typing, will cause carpal tunnel symptoms. Performing repetitive wrist and finger flexion causes inflammation of the flexor tendons due to friction within the compressed carpal tunnel; leading to damage of the underlying tendons, blood vessels and median nerve. . . .[5]

On January 26, 2012, claimant was evaluated at respondent's request by orthopedic specialist Dr. Brian J. Divelbiss. The report of Dr. Divelbiss indicated claimant worked in a call center and spent most of her day on a computer. His impression was that claimant had bilateral carpal tunnel syndrome, right worse than left. Dr. Divelbiss opined that while claimant's "work activities may certainly be an aggravating factor in the presentation of her carpal tunnel syndrome, there is no evidence that keyboard activities would be considered the prevailing cause in the presentation or continuation of carpal tunnel syndrome."[6] Dr. Divelbiss indicated "[a]ggravating is a factor which may take an underlying condition

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[4] P.H. Trans., Cl. Ex.1.

[5] *Id.*

[6] Divelbiss Depo., Ex. 2 at 2.

and make it more symptomatic."[7] Dr. Divelbiss testified that keyboarding can never be the cause of carpal tunnel syndrome; consequently, keyboarding cannot be the prevailing factor causing claimant's injuries. He testified the most significant factors in the development of claimant's bilateral carpal tunnel syndrome were her gender, age and obesity. He acknowledged that whatever the cause of claimant's bilateral carpal tunnel syndrome, she needed surgery.

Dr. Divelbiss ascribes to a medical philosophy that the etiology of carpal tunnel syndrome is primarily structural, genetic and/or biological. He believes the vast majority of carpal tunnel syndrome conditions are idiopathic and that environmental and occupational factors, such as repetitive hand use, play a "more minor and more debatable impact."[8] Dr. Divelbiss testified this philosophy is generally accepted within the American Academy of Orthopedic Surgeons and is the majority view of most orthopedic hand specialists. However, he provided no basis for this belief. When asked what, if any, work activities are generally considered causative factors of carpal tunnel syndrome, Dr. Divelbiss testified that long-term exposure to vibratory tools such as driving, or any job requiring "strenuous and repeated wrist flexion and extension"[9] would be activities that are causative factors of carpal tunnel syndrome.

Dr. Divelbiss relied on a scientific article entitled, "The Quality and Strength of Evidence for Etiology: Example of Carpal Tunnel Syndrome" coauthored by Santiago Lozano-Calderon, MD; Shawn Anthony, BS; and David Ring, MD, PhD, which was published by the American Society for Surgery of the Hand in 2008.[10] The authors reviewed 117 articles and studies that dealt with the causation of carpal tunnel syndrome and concluded that current scientific evidence is inadequate to implicate environmental or occupational factors in carpal tunnel syndrome. Of the 117 publications reviewed by the authors, 45 evaluated the role of repetitive hand use in the etiology of carpal tunnel syndrome. Of the 45 publications, 66% found a correlation between repetitive hand use and carpal tunnel syndrome.[11] Despite this, the authors concluded occupational factors play a minor role in the etiology of carpal tunnel syndrome.

At the preliminary hearing, claimant's attorney introduced Claimant's Exhibit 1, which contained medical reports of Drs. Stuckmeyer and Elton and the MSD document. Claimant's brief stated the reports of Drs. Ryan and Oxler were part of Claimant's Exhibit 1.

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[7] *Id.*, at 24.

[8] *Id.*, at 11.

[9] *Id.*, at 12.

[10] *Id.*, Ex. 3.

[11] *Id.*

This Board Member then contacted the attorneys for respondent and claimant. They indicated the medical reports of Drs. Ryan and Oxler and the medical records from OHS were inadvertently left out of Claimant's Exhibit 1. The parties then entered into a stipulation that Claimant's Exhibit 1 should consist of the medical report of Dr. Stuckmeyer, the medical records of Drs. Elton, Ryan and Oxler, the OHS records and the MSD document.

At the preliminary hearing, respondent objected to Claimant's Exhibit 1 because it contained Dr. Stuckmeyer's report and the MSD document. Respondent's objection to Dr. Stuckmeyer's report was based upon the requirements of K.S.A. 2011 Supp. 44-534a and K.S.A. 2011 Supp. 44-551. Respondent asserts that Dr. Stuckmeyer's report was not included in claimant's application for preliminary hearing and was not provided within a reasonable time. Respondent took the deposition of Dr. Brian J. Divelbiss on February 6, 2012. Respondent asserts that claimant had the report of Dr. Stuckmeyer prior to Dr. Divelbiss' deposition, but did not provide a copy of Dr. Stuckmeyer's report to respondent until after the deposition of Dr. Divelbiss. Claimant responded that a copy of the report was provided to respondent on February 6, 2012, a few hours after claimant's attorney received it.

Respondent objected to the MSD document on the grounds that there was a lack of foundation. Specifically, respondent contended there was no indication of where the document came from or who authored it.

At the preliminary hearing, the ALJ stated he would take under advisement respondent's objection to Dr. Stuckmeyer's report and the MSD document. In his preliminary Order, the ALJ stated, "Respondent/Insurance Carrier's objection to Claimant's Exhibit 1 is denied. The report was given to Respondent the date it was received."[12] ALJ Howard's Order does not specifically mention any of the medical reports or documents contained in Claimant's Exhibit 1.

In his preliminary Order, ALJ Howard did not make a specific finding that claimant's carpal tunnel syndrome arose out of and in the course of her employment with respondent. The ALJ authorized Dr. Elton to perform surgery on claimant, which implies the ALJ concluded claimant's injuries arose out of and in the course of her employment with respondent.

PRINCIPLES OF LAW

The 2011 legislative session resulted in amendments to the Kansas Workers Compensation Act. K.S.A. 2011 Supp. 44-501b(c) provides:

[12] ALJ Order (February 8, 2012).

The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2011 Supp. 44-508 provides in relevant parts:

(e) "Repetitive trauma" refers to cases where an injury occurs as a result of repetitive use, cumulative traumas or microtraumas. The repetitive nature of the injury must be demonstrated by diagnostic or clinical tests. The repetitive trauma must be the prevailing factor in causing the injury. "Repetitive trauma" shall in no case be construed to include occupational disease, as defined in K.S.A. 44-5a01, and amendments thereto.

In the case of injury by repetitive trauma, the date of injury shall be the earliest of:

(1) The date the employee, while employed for the employer against whom benefits are sought, is taken off work by a physician due to the diagnosed repetitive trauma;

(2) the date the employee, while employed for the employer against whom benefits are sought, is placed on modified or restricted duty by a physician due to the diagnosed repetitive trauma;

(3) the date the employee, while employed for the employer against whom benefits are sought, is advised by a physician that the condition is work-related; or

(4) the last day worked, if the employee no longer works for the employer against whom benefits are sought.

In no case shall the date of accident be later than the last date worked.

(f)(1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

(A) An injury by repetitive trauma shall be deemed to arise out of employment only if:

(i) The employment exposed the worker to an increased risk or hazard which the worker would not have been exposed in normal non-employment life;

(ii) the increased risk or hazard to which the employment exposed the worker is the prevailing factor in causing the repetitive trauma; and

(iii) the repetitive trauma is the prevailing factor in causing both the medical condition and resulting disability or impairment.

. . . .

(3)(A) The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include:

(i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;

(ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;

(iii) accident or injury which arose out of a risk personal to the worker; or

(iv) accident or injury which arose either directly or indirectly from idiopathic causes.

. . . .

(g) "Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

K.S.A. 2011 Supp. 44-534a(a)(2) states in pertinent part:

A finding with regard to a disputed issue of whether the employee suffered an accident, repetitive trauma or resulting injury, whether the injury arose out of and in the course of the employee's employment, whether notice is given, or whether certain defenses apply, shall be considered jurisdictional, and subject to review by the board.

K.S.A. 2011 Supp. 44-551(i)(2)(A) states in pertinent part:

If an administrative law judge has entered a preliminary award under K.S.A. 44-534a and amendments thereto, a review by the board shall not be conducted under this section unless it is alleged that the administrative law judge exceeded the administrative law judge's jurisdiction in granting or denying the relief requested at the preliminary hearing. Such an appeal from a preliminary award may be heard and decided by a single member of the board.

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.[13] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2011 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[14]

ANALYSIS

In his Order, the ALJ denied respondent's objection to Claimant's Exhibit 1 to the preliminary hearing transcript. In the next sentence of his Order, the ALJ goes on to say the report was given to respondent the date it was received. This causes some confusion as it implies the ALJ considered only respondent's objection to Dr. Stuckmeyer's report. The language of the ALJ's preliminary Order does not specifically indicate whether the ALJ sustained or denied respondent's objection to the MSD document. However, this Board Member believes the ALJ's initial statement that he was denying respondent's objection to Claimant's Exhibit 1 applied to respondent's objection to Dr. Stuckmeyer's report **and** the MSD document.

This Board Member finds that neither K.S.A. 2011 Supp. 44-534a nor K.S.A. 2011 Supp. 44-551 give the Board jurisdiction to review the ALJ's ruling that Dr. Stuckmeyer's report and the MSD document were admissible. In *Gilchrist*,[15] a Board Member held that the ALJ did not exceed his authority by admitting a medical report. In *Dowell*,[16] a Board Member held that an ALJ's ruling that drug test results were inadmissible was an interlocutory ruling and thus not appealable.

Respondent asserts the cause of claimant's bilateral carpal tunnel syndrome is unknown. Respondent argues that while claimant's work activities may have aggravated her bilateral carpal tunnel syndrome, her work activities were not the prevailing factor causing claimant's bilateral carpal tunnel syndrome.

Drs. Stuckmeyer and Divelbiss examined claimant a week apart yet gave widely divergent opinions on whether claimant's work activities were the cause of her bilateral carpal tunnel syndrome. Dr. Stuckmeyer gave a detailed explanation of how repetitive work activities cause carpal tunnel syndrome. He opined that within reasonable medical

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[13] K.S.A. 2011 Supp. 44-534a.

[14] K.S.A. 2011 Supp. 44-555c(k).

[15] *Gilchrist v. Herrman's Excavating, Inc.*, No. 1,044,329, 2009 WL 4674079 (Kan. WCAB Nov. 30, 2009).

[16] *Dowell v. Copp Transportation*, No. 1,004,562, 2004 WL 1810316 (Kan. WCAB July 16, 2004).

certainty, as a direct, proximate, and prevailing factor of repetitive keyboarding performed, claimant developed symptoms of bilateral carpal tunnel syndrome.

Dr. Divelbiss is of the opinion that only a very few occupational activities can cause carpal tunnel syndrome and keyboarding is not one of those activities. Dr. Divelbiss testified that carpal tunnel can be caused by work activities that involve strenuous and repeated wrist flexion and extension. Keyboarding requires those very activities. He relies on a study that studied other articles and studies, which concluded the etiology of carpal tunnel syndrome is primarily structural, genetic and biological. Dr. Divelbiss testified, "[t]he vast majority of carpal tunnel is idiopathic, so we don't know what causes it."[17]

This Board Member finds the opinions of Dr. Stuckmeyer more credible than those of Dr. Divelbiss. Dr. Divelbiss' philosophy that keyboarding can never be the prevailing factor causing carpal tunnel syndrome and that most work-related activities only aggravate carpal tunnel syndrome is too rigid and is not supported by the medical research he purports to rely on for this opinion. In essence he believes repetitive work activities can only be the prevailing factor if they cause the underlying medical condition. He relies on a study made of other studies and scientific articles on the subject of carpal tunnel syndrome. At least some of those studies found there was a correlation between the development of carpal tunnel syndrome and repetitive hand use.

Keyboarding, such as that performed by claimant, nearly the entire workday, requires repeated hand movement and finger flexion. Claimant's testimony that her work activities caused numbness and tingling in her hands and wrist pain is convincing. This Board Member finds that claimant's work activities were the prevailing factor causing her carpal tunnel syndrome. Simply put, claimant has met her burden of proving that she suffered bilateral carpal tunnel syndrome as a result of repetitive trauma arising out of and in the course of her employment with respondent.

CONCLUSION

1. The Board is without jurisdiction to review the ALJ's finding admitting Dr. Stuckmeyer's report and the MSD document into evidence.

2. Claimant proved by a preponderance of the evidence that she sustained bilateral carpal tunnel syndrome by repetitive trauma arising out of and in the course of her employment.

WHEREFORE, the undersigned Board Member affirms the February 8, 2012, preliminary hearing Order entered by ALJ Howard.

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[17] Divelbiss Depo. at 29.

IT IS SO ORDERED.

Dated this ____ day of May, 2012.

HONORABLE THOMAS D. ARNHOLD
BOARD MEMBER

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